IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 686 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 to 5 NO

==========

AVANI B SHAH - Petitioner(s)
Versus
ADDITIONAL DIRECTOR MEDICAL EDUCATION & RESEARCH & 1 - Respondent(s)

==========

Appearance :

MR MUKUL SINHA for Petitioner(s) : 1,
MS ARCHANA RAVAL ASSTT GOVERNMENT PLEADER for Respondent(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 25/07/2006

CAV JUDGMENT

1. The petitioner, a librarian with B.J.Medical College, Ahmedabad, has approached this Court under Article 226 of the Constitution

with the prayers to direct the respondent to correct her date of birth in the service book and to take consequential actions. She had earlier approached this Court by way of SCA No.8860 of 2003 wherein it was directed on 19.11.2003 that the application/representation dated 21.4.2001 made by the petitioner be considered and decided in accordance with law within two months, and liberty was granted to challenge the decision in case the application was rejected. While issuing those directions, the Court, *inter alia,* observed as under:

> *".....Accordingly, the entry was made in her service record when she entered the service in the year 1970. Immediately within five years thereafter i.e., on 3rd May, 1974, the petitioner made a representation to correct the entry with respect to her date of birth. She also produced the Birth Certificate issued by the Municipal Corporation of Varanasi [the birth place of the petitioner]. It is admitted that the said application was not accepted in as much as no formal communication of acceptance thereof was received by the petitioner, nor the alteration in her date of birth was made in the service record. However, in the gradation lists published from time to time, the date of birth of the petitioner was recorded as 30th December, 1950. Mr.Sinha has submitted that the petitioner, therefore, presumed that the aforesaid application was accepted and necessary change in the Service record was effected. The said situation continued right upto the year 2000. However, in the gradation list published in the year 2000, the petitioner's date of birth was recorded as 30th December, 1948. The petitioner, therefore, on 21st April, 2001 made application for change in the service*

record with respect to her date of birth. The Dean of the College has recommended the case of the petitioner. However, the same is not decided as yet."

2. Thereafter, pursuant to the above directions, the impugned order dated 8.12.2004 refusing to change the date of birth was made. That does not state, as the reason of rejection, that the application of the petitioner for correction of the date of birth was belated or that the date of birth could not be changed at the fag end of her career. But the reasons for rejection are that the birth certificate showing the date of birth to be 30.12.1950 did not mention the name of the child whose birth was registered; that, if the alleged date of birth in the year 1950 were considered, her entry in school had to be at the age of three and she had to be presumed to have passed SSC Examination at the age of 13 which did not appear to be true; and 30.12.1948 was the date of birth mentioned in the Scholar's Register of Banaras Hindu University. The impugned order has cited Government Resolution dated 11.8.1989 according to condition No.3 whereof, the birth date entered into the register of births and deaths was required to be taken as true and final.

3. Thus, the issue before the Court is

whether the educational certificates submitted by the petitioner herself at the time of entry into service were to be relied upon in preference to the date of birth mentioned in the certificate of birth which did not show the name of the petitioner. It may have to be incidentally seen which date of birth appeared to be true and correct.

4. According to the petitioner, the date of birth entered in her certificate of SSC Examination, i.e. 30.12.1948, was wrong and, in reality, her actual date of birth was 30.12.1950 as was entered in the Births and Deaths Register of Varanasi Maha Nagarpalika. She and her elder sister, namely, Anjana, was admitted in Central Hindu Girls' School, Banaras on the same day and she was born on 11.10.1948. Due to a clerical mistake, the date of birth of her elder sister was inadvertently entered as the date of birth of the petitioner. The parents of the petitioner did not correct the mistake in her date of birth in the school record. After entering the service on 3.11.1970, she made a representation dated 3.5.1974 for correction of her date of birth. Thereafter, seniority lists which were published by the authorities right from 1980 till 1998 correctly stated her date of birth as 30.12.1950. Therefore, she presumed that her date of birth

was corrected also in her service book. However, in the seniority list published in August 2000, again, the original entry of date of birth, i.e. 30.12.1948, re-appeared and, once again, she made a representation dated 15.7.2002 requesting to correct her date of birth. The Dean of B.J.Medical College, where she was serving, recommended that her correct date of birth may be entered in the service book and the petitioner made several representations thereafter, but the authorities remained silent and refused to enter the correct date of birth in the service record. After the aforesaid order in SCA No.8860 of 2003 which was disposed with the direction to decide her representation within a period of two months, the representation was not decided despite about half-a-dozen reminders followed by a notice for contempt dated 4.12.2004. On receipt of the notice for contempt, the respondent made the impugned order dated 8.12.2004 rejecting the representation of the petitioner.

5. According to the affidavit of the Joint Secretary, H & F.W.Department, made on behalf of the respondent, the school leaving certificate, matriculation passing certificate, or the birth certificate issued by the municipal corporation were considered as document showing the correct date of birth. It is submitted that, after the

birth of a child, her name has to be compulsorily entered within one year in the record of the local authority as per the prevailing norms. It is denied, on the basis of no such record being available in the office of the deponent, that his office had received the petitioner's representation dated 3.5.1974. The deponent has, in his affidavit, relied upon the judgments of the Apex Court in ***Union of India v. C. Ramaswamy [(1997) 4 SCC 647] and Hindustan Lever Ltd. v. S.M.Yadav [AIR 2001 SC 1666]*** to submit that principle of estoppal would apply once the candidate had secured entry into service, possibly in preference to others, and the relief of change of date of birth could be legitimately denied. The well-settled position of law that change of birth date at the fag end of career was not permissible was also relied upon.

6. By filing an additional affidavit, the petitioner has placed on record copies of the certificates of Banaras Hindu University showing her date of birth, passing of admission examination in March, 1964 as also similar certificates of her sister, namely, Ms.Anjana, showing her date of birth to be the same and passing by her of the admission examination in March, 1966. A copy of the affidavit of the mother of both the girls is also annexed with the

affidavit to show that Ms.Anjana was born on 11.10.1948. That affidavit appears to have been executed on 19.10.1999 for the purpose of obtaining immigration visa of the United States. Obviously, the date of birth of both the sisters on the record of Banaras Hindu University was 30.12.1948 and 11.10.1948, one of which could not be true; and the year of passing the admission examination was March, 1964 in case of the petitioner and March, 1966 in case of her sister; even as the date of admission in the Central Hindu Girls' School, Banaras were shown to be the same, i.e. 8.7.1958, that anomalous situation was explained by copies of the Scholar's Register of both the sisters wherein the petitioner was shown to have been regularly promoted from Class V to X passing the final examination each year; and her sister was shown to have been retained in Std.VI and VIII resulting into her leaving the school and passing the admission examination later by two years. That contemporary records of the school and Banaras Hindu University appear to be correct and genuine and could not be controverted. Therefore, there are reasons to believe that the correct date of birth of the petitioner was 30.12.1950 and the certificate of birth stating that date without mentioning the name of the petitioner, in fact, was the birth certificate of the petitioner. The acceptance by

the respondent of that date of birth for the purpose of seniority lists for almost 20 years also indicates that the petitioner had made the necessary representation within five years of her entry into service and, upon consideration of that representation, she was given to understand that her demand for change in the date of birth was accepted.

7. Examining the impugned order and the averments of the respondent in light of the above, it appears that, though the birth certificate did not mention the name of the petitioner, it indicated the correct date of birth of the petitioner and the educational certificates did not show the correct date of birth. The contention that the petitioner could not have entered the school in Std.I at the age of 3 years and could not have cleared the SSC Examination at the age of 13 years could not be held to be conclusive against the petitioner for the simple reason that it was not impossible either that a precocious child would go to school with her elder sister at such young age and pass SSC Examination even earlier than her elder sister who failed twice before her matriculation. Even according to the impugned order itself and the Resolution dated 11.8.1989 of the Government mentioned as the basis therein, the date

mentioned in the birth certificate has to be accepted as correct and final for all purposes in case of any change in the date of birth in the school leaving certificate or the matriculation certificate. Therefore, the representation of the petitioner for entering the correct date of birth ought to have been accepted by the respondent and the impugned order dated 8.12.2004 appears to be unreasonable and actuated by antagonism occasioned by the petitioner's notice for contempt. There is no substance in the argument of the respondent that the issue of change in the date of birth could not be agitated at the fag end of service in view of the above facts and because the change is not refused on that ground. As held by the Supreme Court in ***Union of India v. Harnam Singh [(1993) 2 SCC 162]***:

> *"A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay."*

And, after quoting the above, it is observed, as under, by the Apex Court in State of ***U.P. v. Shiv Narain Upadhyaya [(2005) 6 SCC 49]***:

> *".....As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, i his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of the court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an*

interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior."

8. In the facts of the present case, the question of granting of interim relief has not arisen because the petitioner is yet to reach the age of superannuation and the question of limitation could not be re-agitated after the direction of this court in the earlier proceedings to decide the application of the petitioner. In the peculiar facts of the respondent accepting the change in the date of birth of the petitioner, or at least giving her to understand that by mentioning the later date in the seniority lists consistently for 20 years and then reverting to the original date for the purpose of retiring the petitioner, it appears that injustice is done to the petitioner.

9. Therefore, in exercise of the jurisdiction of this court under Article 226 of the Constitution, the impugned order dated 8.12.2004 is set aside and the respondents concerned are directed to correct the date of birth in the service record of the petitioner by

replacing the incorrect date of birth by 30.12.1950 and accept it as the correct date of birth for all purposes. Rule is made absolute accordingly with no order as to costs.

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)